

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4149

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ACME WIRE WORKS, INC.,

Respondent.

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

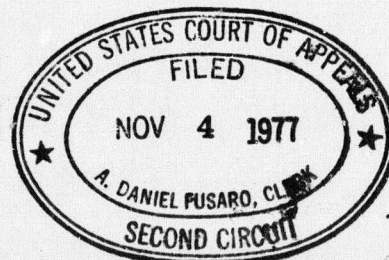
**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to honor and implement the terms of the contract negotiated on its behalf by a multi-employer bargaining association.

2. Whether the Board's order properly required the Company to offer reinstatement to its striking employees.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of its order issued April 28, 1977, against Acme Wire Works Inc. (herein "the Company"). The Board's decision by Members Jenkins, Penello and Walther is reported at 229 NLRB No. 57 (A. 260-261)^{1/}. This Court has jurisdiction, the unfair labor practices having occurred in Brooklyn, New York, where the Company is engaged in the manufacture, sale, and distribution of various metal and wire products (A. 245).

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective bargaining agreement between Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (herein "the Iron Workers") and the multi-employer association which was authorized to bargain for the Company. The Board also found that the Company violated Sections 8(a)(1), (2) and (3) by entering into a contract containing a union security clause with the

^{1/} Record references are to pages of the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

^{2/}Teamsters at a time when it was obligated to bargain with the Iron Workers as the exclusive representative of its employees. Finally, the Board found that on or after February 20, 1976, the Company's striking employees were engaged in an unfair labor practice strike. The evidence underlying the Board's findings is detailed below.

A. Background

Since about 1940, the Iron Workers has represented the production and maintenance employees of the employer-members of the Wire Works Manufacturers Association (hereafter "the Association") (A. 246; 28). The Company has been a member since at least 1964 (A. 28). The Iron Workers also represents production and maintenance employees of the employers of two other employer associations, Allied Building Metal Industries, Inc. (hereafter "Allied") and the Independent Association of Steel Fabricators, Inc. (A. 246; 36). In addition, the Iron Workers bargains separately with about sixty independent companies. (A. 246; 36-37). Traditionally, the Iron Workers first negotiated a contract with Allied or, on some occasions, with the independent employers. The Association and the Iron Workers would then use the previously negotiated agreement as the basis for their contract. (A. 247; 37, 59-60).

^{2/} Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Teamsters").

**B. The Iron Workers and the Association
Begin Negotiations in June**

The Iron Workers contracts with all employers expired on June 30, 1975 (A. 246; 28). In April 1975, the Iron Workers notified the Association of its desire to negotiate a new contract (A. 246; 31; 262). In May 1975, the Iron Workers sent a letter to the Association requesting a list of employers the Association would be representing in the negotiations. The letter further stated that if the Association had any new members the Iron Workers would "need confirmation from them that your association is authorized to represent them." (A. 246; 263). In response, the Association provided the Iron Workers with a list of the employers, including the Company, represented by the Association (A. 246; 264-265).

The parties held two negotiating sessions in June 1975. The first meeting was held on June 16, the second on either June 24 or 26 (A. 246; 62, 69, 168). The Iron Workers was represented by Business Agent William Matienzo and Executive Board member Frank Hernandez (A. 62). The Company was represented at both meetings by J. P. Batthaney (A. 247; 62). Thomas Kennedy, the chief spokesman for the Association, was assisted by Joseph Bardy (A. 62, 162).

At or prior to the first session, the Iron Workers gave the Association proposals for a new contract (A. 246; 64). The proposals sought, in general terms, increases in wages and contributions to employee fringe benefit funds (A. 246; 122-127). At the first meeting, the parties engaged in a general discussion about the economic situation in the industry

(A. 246; 64). By letter dated June 19, the Association rejected the Iron Workers' proposal, and instead proposed that the expiring contract be continued for three years. (A. 247; 269-271). At the second meeting, the Association repeated its proposal to extend the contract, which the Iron Workers rejected (A. 247; 71). The parties discussed the need for better employee training programs and Association objections to certain aspects of the vacation benefit proposal (A. 246; 72, 205-206). Iron Workers representative Matienzo responded that both of these issues could be worked out (A. 72). Additionally, the Association asserted that it wanted the right to purchase certain prefabricated panels. Matienzo responded that he wanted to evaluate the proposal and that he would discuss it at subsequent bargaining sessions. (A. 246; 76.) The Iron Workers also asked the Association to make a wage proposal (A. 246; 78-79). The Association stated that it had no wage proposal to make at the time, adding that there was no sense in making an offer until the Iron Workers concluded negotiations with Allied (A. 246; 79). At the conclusion of the second meeting the parties agreed to contact each other in July (A. 246; 80).

On July 1, 1975, the Iron Workers commenced a strike against those employers who had not signed a new contract with it, including the eight employer-members of the Association (A. 247; 36). About July 15, 1975 Matienzo informed Bardy that the Iron Workers had a new proposed contract which provided: that the expiring contract be extended for one year, with specified modifications including a 10 percent wage increase;

that the Company pay the trust fund benefits to be negotiated by the Iron Workers and Allied; and that, if a longer term contract were negotiated with the industry, the Association would adopt that contract after the first year (A. 247; 80). Matienzo then delivered the proposals to Bardy (A. 247; 81). By letter dated July 23, the Association rejected the new proposals but added its hope that the Iron Workers' position "will become more receptive" and requested that the Iron Workers let it "know of any changes." (A. 247; 273).

During August, while on the picket line, Matienzo spoke with Kennedy and Bardy. The two Association representatives again stated that they would not sign the Iron Workers' proposals and that they were waiting for the Allied group to settle before engaging in further bargaining. (A. 247; 84).

From July 1975 through mid-January 1976, there were no bargaining sessions between the Iron Workers and the Association, nor did either party request bargaining (A. 247; 59, 175). During this period the Iron Workers continued negotiating with Allied (A. 247; 56-57).

- C. The Company signs a contract with the Teamsters; the Iron Workers and the Association reach agreement; the Company refuses to execute the contract and to reinstate its striking employees.

In late December 1975 or early January 1976, the Company recognized the Teamsters as the representative of its employees and entered into a collective bargaining agreement with the Teamsters dated January 1, 1976 (A. 247; 102; 274). The agreement provided that, as a condition

of employment, all of the Company's employees become and remain members of the Teamsters (A. 247; 274).

In early January 1976, the Iron Workers reached agreement on its contract with Allied (A. 247; 85). A week later, on January 13, 1976, the Iron Workers and the Association held a negotiating session (A. 247; 39). The Iron Workers presented to the Association a new agreement based upon the settlement with Allied and the independent employers (A. 247; 40). The Association indicated a willingness to accept the basic economic package to which Allied had agreed and the parties discussed language changes (A. 247; 85, 87). In addition, the Iron Workers agreed to the Association's demand for the right to buy prefabricated panels but wanted time to study the language of the proposal (A. 247; 87). The parties arranged to meet again in one week (A. 40).

When the Company did not send a representative to the January 13 meeting, Iron Workers President William Colavito asked the Association's negotiator about this (A. 248; 89). Association representative Kennedy said he had heard that the Company "was finished with us" (A. 248; 91). Kennedy would not divulge the source of this information but agreed to let the Iron Workers know definitely by the next meeting (A. 248; 91).

The next bargaining session was held on January 19. After discussing various topics, the Iron Workers and the Association reached agreement and executed a stipulation embodying the agreed upon terms (A. 248; 42). The Company did not send a representative to this meeting, and when Colavito again inquired about the Company, Association representative

Bardy said that he had just received a letter of resignation from the Company (A. 248; 44). Colavito asked Bardy to indicate on the letter that he had just received it. Bardy wrote that he received the letter, dated August 11, 1975, on January 16, 1976. (A. 248; 44-45; 266.)

On January 20, 1976, Matienzo told Company representative Batthaney that the Iron Workers had reached an agreement with the Association and that he wanted the Company to honor it and reinstate the employees (A. 248; 97-98). Batthaney responded that the Company had withdrawn from the Association and would have nothing more to do with the Iron Workers (A. 248; 98). On March 24, 1976, the Iron Workers mailed a copy of the agreement to the Company, again stating that the Iron Workers considered the Company bound by the agreement (A. 248; 267).

On January 20, 1976, the Iron Workers ended its strike against all the employer members of the Association except the Company (A. 249; 98-99). On March 29, 1976, the Iron Workers sent a letter to the Company unconditionally requesting on behalf of the Company's employees that they be returned to work (A. 249; 50, 100, 268). The Company never responded to that request (A. 249).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded that the Company's attempted withdrawal occurred after negotiations had begun and was therefore untimely. Accordingly, the Board found that the Company's refusal to execute the new Association-Iron Workers agreement violated Section 8(a)(5) and (1) of the Act (A. 254). The Board also

found that the Company violated Sections 8(a)(1), (2) and (3) of the Act by recognizing the Teamsters and by signing a contract which included a union security clause at a time when the Company was obligated to bargain with the Iron Workers (A. 254). Finally, the Board found that the Company's employees remained on strike on and after February 20, 1976, because of the Company's unlawful refusal to sign the association agreement. The Board found that the strike was converted into an unfair labor practice strike on that date and that the Company's refusal to reinstate its employees upon their unconditional offer to return to work on March 29 violated Section 8(a)(3) and (1) of the Act (A. 254).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with its employees' Section 7 rights (A. 255-256). Affirmatively, the Board's order requires the Company to sign and implement the agreement reached by the Iron Workers and the Association on January 19, 1976, and give retroactive effect to it from its effective date; to withdraw recognition from the Teamsters; to offer its employees reinstatement and make them whole for any loss of pay suffered; and to post the appropriate notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) and (1) OF THE ACT BY ITS REFUSAL TO ADOPT THE COLLECTIVE BARGAINING AGREEMENT NEGOTIATED ON ITS BEHALF

A. Applicable Principles

Section 8(d) of the Act defines the duty "to bargain collectively" as including "the execution of a written contract incorporating any agreement reached, if requested by either party." See Heinz & Co. v. N.L.R.B., 311 U.S. 514, 526 (1941). This requirement applies whether an employer engages directly in bargaining with a union or delegates its bargaining authority to a multi-employer association. See N.L.R.B. v. Strong d/b/a Strong Roofing & Insulating, 393 U.S. 357, 359 (1969). Accordingly, an employer member of a multi-employer association is obligated to execute a contract negotiated by an association which is authorized to bargain on its behalf. N.L.R.B. v. Sheridan Creations, Inc., 357 F.2d 245 (C.A. 2, 1966), cert. denied, 385 U.S. 1005 (1956).

In exercising its "specialized judgment" with respect to questions about multi-employer bargaining relationships (N.L.R.B. v. Truck Drivers Local No. 449 (Buffalo Linen), 353 U.S. 87, 96 (1957)) the Board, with court approval, has determined that an employer cannot withdraw from a multi-employer association once negotiations for a new contract have begun, absent consent or unusual circumstances. Retail Associates, Inc., 120 NLRB 388, 393-395 (1958); N.L.R.B. v. Sheridan Creations, Inc., *supra*, 357 F.2d at 247-248; N.L.R.B. v. John J. Corbett Press, 401 F.2d 673, 675 (C.A. 2, 1968); N.L.R.B. v. Johnson Sheet Metal, Inc., 442 F.2d 1056, 1059

(C.A. 10, 1971)^{3/} These holdings reflect the Board's judgment that the stability and effectiveness of multi-employer bargaining would be impaired if a party could withdraw whenever it was dissatisfied with the course of bargaining (N.L.R.B. v. Tulsa Sheet Metal Works, 367 F.2d 55 (C.A. 10, 1966)) or could use the threat of withdrawal as a "bargaining lever." N.L.R.B. v. Sheridan Creations, *supra*, 357 F.2d at 248.

B. The Company's Attempted Withdrawal
From The Association Was Untimely

In the instant case the Company's attempted withdrawal occurred well after negotiations between the Iron Workers and the Association began. As shown in the Statement, the Iron Workers and the Association held two bargaining sessions in June 1975 in which Company representative Batthaney participated. As related, *supra*, pp 4-5, at these meetings the Iron Workers and the Association discussed their positions with respect to specific issues including vacation benefits, the employers' rights to purchase certain prefabricated material and improvement of employee training programs, as well as outlining in general terms their bargaining goals and constraints. The Iron Workers submitted two proposed agreements, one of which included a 10 percent wage increase, which the Association rejected. The Association's

^{3/} In recognition of the fact that multi-employer bargaining is voluntary and based upon mutual consent (N.L.R.B. v. Sheridan Creations, *supra*, 357 F.2d at 248), the Board permits any party to withdraw prior to the start of negotiations by presenting to the other party a letter expressing in unequivocal terms that the party is withdrawing. Retail Associates, *supra*, 120 NLRB at 395; N.L.R.B. v. Central Plumbing Co., 492 F.2d 1252, 1255 (C.A. 6, 1974).

proposal that the expiring contract be continued was unacceptable to the Iron Workers. Although the Iron Workers requested the Association to make a wage proposal, the Association declined to do so stating that it would prefer to await the outcome of the negotiations with Allied. Accordingly, it is clear that the parties had commenced bargaining in June, long before the Company even intimated that it was considering withdrawing. See N.L.R.B. v. Spun-Jee Corp., 385 F.2d 379, 381-382 (C.A. 2, 1967); Carvel Co. v. N.L.R.B., ___ F2d ___, 96 LRRM 2107, 2111 (C.A. 1, 1977).

Moreover, the Iron Workers first learned of the Company's attempted withdrawal only after serious bargaining resumed in January. Thus, on January 13, the Iron Workers presented the Association with a proposed contract based upon its contracts with Allied and 15 independent employers (A. 40). The Association indicated a willingness to accept the wage and economic terms agreed to by Allied but wanted to modify some of the language. In addition, the Association gave the Iron Workers a draft of a proposed clause concerning subcontracting of materials. The Iron Workers agreed to permit some subcontracting but wanted time to revise the proposed clause. At the conclusion of the January 13 session the parties scheduled another meeting. On January 19--the date upon which the Company's letter of resignation was presented to the Iron Workers for the first time--the Association and the Iron Workers reached final agreement and executed the contract. Because withdrawals are effective only when the other party to the contract is notified, the Company's withdrawal

would only have become effective on January 19 and thus was clearly untimely N.L.R.B. v. Dover Tavern Owners' Assn., 412 F.2d 725, 728, n. 7 (C.A. 3, 1969); Goodsell & Vocke, Inc., 223 NLRB 60, 66 (1976), enf'd, 559 F.2d 114, (C.A. 9, 1977); See also Pomona Building Materials Co., Inc., 174 NLRB 558, 570 (1969), enf'd, 73 LRRM 2944 (C.A. 9, 1970).^{4/} Consequently, the Company was bound by the agreement and its subsequent refusal to execute the agreement was unlawful unless justified by unusual circumstances. We now show that there were no such circumstances.

C. The Company's Contentions Are Without Merit

Before the Board, the Company argued principally that its untimely withdrawal was justified by "unusual circumstances." Specifically, the Company asserted that its withdrawal was effective because the Iron Workers and the Association had reached impasse, because the Iron Workers had not bargained in good faith and finally because the Company was faced with "dire economic circumstances." We show below that none of these contentions have merit.

^{4/} Before the Board the Company argued that it withdrew from the Association in July 1975 (A. 239). This argument fails for two reasons. First, the Company concedes that the Iron Workers was not notified of the Company's intention to withdraw until January (A. 222-223), and, as shown supra, withdrawal is effective only if the other party is notified. Second, the Company never stated unequivocally that it was resigning. Thus, according to Bardy, Company representative Batthany in mid-July "expressed a desire" not to be part of the 1975 negotiations and added only that "it could possibly be that [the Company] wasn't going to be part of the negotiations" (A. 178, 180).
(cont'd)

It should first be noted that the Company did not assert any of these reasons in its letter of withdrawal. In fact, the Company provided no reason for its action (A. 266). Such an omission, as the Board noted, undercuts an asserted justification "because it is unlikely that a circumstance . . . is truly 'unusual' if it is not asserted at the time but rather awaits the onset of litigation" (A. 250). Tulsa Sheet Metal Works, Inc., 149 NLRB 1487, 1488 (1964), enf'd, 367 F.2d 55, 58 (C.A. 10, 1966). See also N.L.R.B. v. Central Plumbing Co., 492 F.2d 1252, 1254, n. 3 (C.A. 6, 1974).

4/ (cont'd)

The Company further objected to the finding that the Iron Workers was first notified of the Company's withdrawal on January 19, contending that notice of withdrawal was given to the Iron Workers on January 12 or 13. The Company relies on Association representative Bardy's testimony that he may have informed Matienzo of the Company's withdrawal during a telephone conversation on January 12 (A. 196, 217) and that he showed the letter to the Iron Workers representative on January 13 (A. 186). In contrast, Iron Workers representatives Colavito and Matienzo both testified that they first learned of the Company's unequivocal desire to withdraw on January 19 (A. 46-47; 94-95). In resolving the credibility dispute, the Administrative Law Judge not only relied on demeanor, but also observed that Bardy's testimony was "confusing and imprecise" (A. 248, n. 5; 185-186, 188-189, 192-194, 209-211). As this Court has repeatedly stated, the question of credibility of witnesses is primarily one for the trier of fact who can observe the witnesses, and the Court will not reverse credibility resolutions unless the credited testimony is "hopelessly incredible" on its face or "flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." N.L.R.B. v. Dinion Coil Co., 201 F.2d 484, 490 (C.A. 2, 1952). Accord: N.L.R.B. v. Columbia University, 541 F.2d 922, 928 (C.A. 2, 1976); N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F.2d 920, 922 (C.A. 2, 1965). The Administrative Law Judge's resolution of the conflicting testimony is entitled to acceptance for the credited testimony was neither inherently implausible nor contrary to documentary evidence.

Contrary to the Company's assertion, the parties did not reach impasse. Rather, the Iron Workers and the Association jointly suspended negotiations because they chose to follow their pattern of previous years and await the results of the Iron Workers negotiations with another employer association.^{5/} There is no evidence that the parties viewed their differences as irreconcilable. Thus, Iron Workers representative Matienzo stated that he thought the Association's concerns about the vacation benefits and the prefabricated panels could be worked out (A. 72, 74, 76).^{6/} Further, the Association, although rejecting the Iron Workers' second proposal on July 23, did not indicate that the parties had reached impasse (A. 273). Moreover, throughout the bargaining hiatus, the Iron Workers continued negotiating with Allied, and the Association kept abreast of the progress of the negotiations because association representative Bardy attended several meeting of the Allied employers (A. 151, 161).

^{5/} Before the Board, the Company objected to the Administrative Law Judge's crediting the testimony of Matienzo that the parties agreed to await the outcome of the Iron Workers-Allied negotiations rather than Bardy's testimony that the Association did not make such an agreement (A. 246-248). As noted, *supra*, n. 4, the Court will rarely disturb a credibility resolution. Moreover, the determination that the parties mutually agreed to suspend negotiations until the Allied employers settled with the Iron Workers is consistent with the parties past practice, the fact that neither party asked for negotiations during the hiatus, and the fact that Bardy participated in the meetings of the employer-members of Allied.

^{6/} Ultimately, the Iron Workers agreed to permit the employers to purchase prefabricated materials (A. 87).

Courts have recognized that the determination of whether parties are at impasse is a question best suited "to the expert experience of a board which deals constantly with such problems." Dallas General Drivers, Warehousemen & Helpers, Local Union No. 747, IBT v. N.L.R.B., 355 F.2d 842, 844 (C.A. D.C., 1966); N.L.R.B. v. J. H. Bonck Co., 424 F.2d 634, 638 (C.A. 5, 1970). Since the June meetings represented the initial stages of the bargaining process and the parties jointly agreed to postpone further negotiations, it is clear that the parties "had neither exhausted bargaining possibilities nor reached the stage where further meetings would have been fruitless." N.L.R.B. v. Dell, 283 F.2d 733, 740 (C.A. 5, 1960). Indeed, upon resumption of bargaining in January, the Iron Workers and the Association reached agreement within two weeks after the Iron Workers concluded negotiations with Allied. See N.L.R.B. v. Tulsa Sheet Metal, supra, 367 F.2d at 58.

Moreover, even if the Iron Workers and the Association had reached impasse during the summer of 1975, the impasse ended with the resumption of serious bargaining on January 13, 1976. As shown, supra, pp. 7-8, the parties reached substantial agreement on January 13 and final agreement on January 19, the date on which the Iron Workers received the Company's resignation letter. See N.L.R.B. v. Johnson Sheet Metal, 442 F.2d 1056, 1060 (C.A. 10, 1971). Cf. N.L.R.B. v. Dell, supra, 283 F.2d at 740.

Equally without merit is the Company's argument that the Iron Workers failed to bargain in good faith in June and July 1975. Initially, the Company is barred from asserting this defense because the union conduct complained of occurred more than six months prior to the filing of an

unfair labor practice charge. Section 10(b) of the Act which precludes issuance of a complaint based upon facts occurring more than six months before a charge is filed,^{7/} has been interpreted to bar defenses based upon unfair labor practices allegedly occurring outside the 10(b) period. N.L.R.B. v. District 30, UMW (Blue Diamond), 422 F.2d 115, 120-122 (C.A. 6, 1969), cert. denied, 398 U.S. 959; Lane-Coos Curry Douglas Counties Building v. N.L.R.B., 415 F.2d 656, 659, n. 7 (C.A. 9, 1969); International Hod Carriers, Local 1298 (Roman Stone), 153 NLRB 659, n. 1 (1965).

In the instant case the Iron Workers' charge was filed on February 20, 1976. Because neither party requested to meet between July 1, 1975 and January 13, 1976, the Iron Workers' alleged failure to bargain in good faith, therefore, could be shown only by relying on the June meetings, events which occurred outside the 10(b) period. Thus, this case presents at most a situation of "mere passive inaction following an old offense" (International Union, United Automobile Workers v. N.L.R.B., 363 F.2d 702, 706 (C.A. D.C., 1966), cert. denied, 385 U.S. 973) and therefore, the defense is barred by Section 10(b). See Cone Mills Corp. v. N.L.R.B., 413 F.2d 445, 448-449 (C.A. 4, 1969); N.L.R.B. v. Louisiana

^{7/} In Local Lodge No. 1424, IAM (Bryan Mfg. Co.) v. N.L.R.B., 362 U.S. 411 (1960), the Supreme Court held that the Board could not find unlawful conduct based upon the enforcement of an agreement entered into more than six months prior to the filing of a charge, even though, when the agreement was entered into the union did not represent a majority. The Court explained that in those circumstances "an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which because of limitations cannot itself be made the subject of an unfair labor practice complaint" 362 U.S. at 419.

Bunkers, Inc., 409 F.2d 1295, 1299-1300 (C.A. 5, 1969)^{8/}.

In any event, the evidence does not support—let alone compel—the conclusion that the Iron Workers did not engage in good faith bargaining. Although the Company urges that the Iron Workers' lack of specificity indicates a failure to bargain in good faith, the Association itself refused to come forth with specific proposals. Thus, the Association refused to make a wage offer when requested by the Iron Workers to do so. In rejecting the Iron Workers' second proposed contract, the Association stated only that it contained "those proposals most objectionable to all our Member shops" but again did not specify which terms it was referring to, nor did it make a counter proposal other than that of continuing the expiring contract. This reluctance by both parties to make specific proposals is consistent with their pattern of deferring negotiations until the Iron Workers reached agreement with Allied.^{9/}

^{8/} As noted by the Board, the Company did not file any charges with the Board alleging that the Iron Workers violated Section 8(b)(3) of the Act. As the First Circuit has stated, "When an employer has refrained from presenting to the Board allegations of union misconduct, we will not entertain the suggestion that there has been conduct which prevents us from enforcing a Board order growing out of unfair labor practice charges which were presented for adjudication by the union." N.L.R.B. v. Crimptex, Inc., 517 F.2d 501, 505 (1975).

^{9/} The pattern of deferral of negotiations does not indicate a failure to bargain in good faith as it was a joint decision between the Iron Workers and the Association. Moreover, Iron Workers President Colavito testified that the Iron Workers initially approached each association or employer with the intent to negotiate a contract and there is no evidence to show that the Iron Workers did not approach its negotiations with the Association in the same manner (A. 60, 130-131).

In addition, because this pattern existed, the Iron Workers' July 1975 proposal that the Association accept the benefits negotiated with employers in the industry was not unreasonable or a refusal to bargain.

Before the Board, the Company also challenged Matienzo's authority to negotiate a contract. Although negotiator Matienzo did not have final authority to accept a contract, he was an experienced negotiator. Thus, Matienzo had been a member of the executive board and had served as union business agent since 1970, with responsibilities for servicing the Company's employees and settling grievances. Further, Matienzo participated in contract negotiations with the Association in 1963, 1970 and 1973 (A. 61, 107, 112). With this background, Matienzo was clearly capable of representing the Iron Workers in the initial stages of bargaining. Moreover, Matienzo informed the Association that Iron Workers President Colavito would meet with the Association in later stages of bargaining (A. 134-135)^{10/}.

The Company does not urge that the January negotiations were not conducted in good faith. As shown, the Iron Workers first learned of the Company's unequivocal statement of resignation on January 19 after bargaining had resumed. Thus, the Company's untimely withdrawal cannot be defended by relying upon any asserted illegal conduct of the Iron Workers.

^{10/} The Association does not claim that it was unaware of the limitations on Matienzo's authority. Moreover, the fact that no officer of the Iron Workers was present at the negotiations was not unprecedented. Thus, in the 1970 negotiations with the Association, the Iron Workers was represented by a business agent and executive board member Matienzo (Tr. 112).

Finally, the Company's contention that "dire economic circumstances" justified its untimely withdrawal is unfounded. Although the Board has permitted withdrawal for economic reasons, an employer must show that it faces "circumstances in which [its] very existence . . . as a viable business entity has ceased or is about to cease." Hi-way Billboards, Inc., 206 NLRB 22, 23 (1973), rev'd on other grounds, 500 F.2d 181 (C.A. 5, 1974).^{11/} Mere business inconvenience, economic hardship or loss of a competitive advantage have never afforded an excuse for withdrawal. See N.L.R.B. v. Tulsa Sheet Metal Works, supra, 377 F.2d at 58; Serv-All Company, 199 NLRB 1131, 1141 (1972). In the instant case the Company did not make any showing that its viability as a business entity was threatened. Rather, it relied on the general depressed state of the wire works industry and on the unsupported assertion that its existence depended on reaching agreement on an individual basis. However, the fact that an employer may be able to obtain more favorable terms by negotiating individually does not justify an untimely withdrawal. "[S]ome responsibility must rest with the employer who invokes the advantages of group bargaining to assess and assume the responsibilities and limitations inherent within." N.L.R.B. v. Tulsa Sheet Metal Works, supra, 367 F.2d at 58. Accord: Retail Clerks Union No. 1550 v. N.L.R.B., 330 F.2d 210, 215 (C.A. D.C., 1964), cert. denied, 379 U.S. 828. Any other rule would threaten the

^{11/} See, e.g., U.S. Lingerie Corp., 170 NLRB 750, 751 (1968) (bankruptcy predating withdrawal from negotiations); Spun-Jee Corp., and the James Textile Corp., 171 NLRB 557, 558 (1968) (economic hardship inherent in the continuance of business in the geographic area); Atlas Electrical Service Co., 176 NLRB 827, 830 (1969) (employer forced to close business for lack of qualified employees and union refused to provide replacements to keep operation alive).

stability of the multi-employer association and thus impair the utility of this form of bargaining. N.L.R.B. v. Tulsa Sheet Metal Works, supra, 367 F.2d at 58; R.B. v. Johnson Sheet Metal, supra. 442 F.2d at 1059. Thus, the Company made no effort to apprise the Iron Workers of its asserted economic difficulties, nor did the Company cite financial difficulties as a reason for withdrawing. Under these circumstances, the Board's finding that the Company's untimely withdrawal was not justified by "dire economic circumstances" is proper.

In sum, the Company's withdrawal from the Association occurred after negotiations between the Iron Workers and the Association had begun. Further, the Company has failed to demonstrate that its untimely withdrawal was justified by "unusual circumstances." Rather, the evidence strongly supports the conclusion that the Company sought to withdraw because it was dissatisfied with the negotiations and hoped to obtain more favorable contract terms on an individual basis. Consequently, the Company was bound to honor the agreement negotiated by the Association and to execute the contract upon request. N.L.R.B. v. Strong d/b/a Strong Roofing & Insulating, 393 U.S. 357 (1969). The Board properly concluded that the Company's failure to do so violated Sections 8(a)(5) and (1) of the Act.^{12/}

^{12/} Before the Board, the Company apparently conceded that its recognition of the Teamsters was proper only if its withdrawal from the Association was timely. As we have shown, the attempted withdrawal was not timely and thus the Company was obligated to bargain with the Iron Workers as the exclusive representative of the employees in the multi-employer unit. N.L.R.B. v. Sheridan, supra, 357 F.2d at 248 (when withdrawal is not timely, the multi-employer unit is the "appropriate" unit for the purpose of collective bargaining). Since the appropriate unit remained the employer wide unit, the Company would not be relieved of its obligation to bargain with the Iron Workers even if a majority of the Company's employees no longer favored the Iron Workers. N.L.R.B. v. Sheridan Creations, Inc., supra, 357 F.2d at 248. Cf. N.L.R.B. v. John J. Corbett Press, Inc., supra, (cont'd)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S FAILURE TO OFFER REINSTATEMENT UPON AN UNCONDITIONAL OFFER TO RETURN TO WORK VIOLATED SECTION 8(a)(3) AND 8(a)(1)

A strike in protest over an employer's violation of the Act is an "unfair labor practice strike" and the "striking employees do not lose their status and are entitled to reinstatement * * * even if replacements for them have been made." Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278 (1956); N.L.R.B. v. Fitzgerald Mills Corp., 313 F.2d 260, 269 (C.A. 2, 1963), cert. denied 375 U.S. 834; N.L.R.B. v. Milco, Inc., 388 F.2d 133, 139 (C.A. 2, 1968). A strike begun in support of economic objectives may subsequently become an unfair labor practice strike if the strikers begin to protest unfair labor practices. The strikers become unfair labor practice strikers on that date and are entitled, upon an unconditional offer to return to work, to immediate reinstatement if they had not been permanently replaced prior to the conversion. N.L.R.B. v. Johnson Sheet Metal, Inc., 442 F.2d 1056, 1061 (C.A. 10, 1971); Philip Carey Mfg. Co., Miami Cabinet Div. v. N.L.R.B., 331 F.2d 720, 729 (C.A. 6, 1964), cert. denied 379 U.S. 888. See N.L.R.B. v. Milco, Inc., *supra*, 388 F.2d at 139.

12/ (cont'd)

401 F.2d 673, 675 (C.A. 2, 1968). The Company's grant of recognition to a minority union therefore constituted unlawful support in violation of Section 8(a)(2) because "the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" International Ladies' Garment Workers' Union v. N.L.R.B., (Bernhardt-Altman), 366 U.S. 731, 737 (1961) quoting N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938).

Further, because the Company-Local 810 agreement contained a union security clause, the Company violated Section 8(a)(3) by depriving the employees of a free choice of bargaining representative and subjecting them to discharge for failure to join or remain members of the Teamsters. Local Lodge No. 1424, International Association of Machinists, AFL-CIO (Bryan Manufacturing Co.) v. N.L.R.B., 362 U.S. 411, 412-414 (1960)

As shown in the Statement, upon reaching agreement with the Association, the Iron Workers ended its strike against all the employer-members but the Company. Moreover, as shown, the Company's refusal to execute the contract upon the Iron Workers' request violated Section 8(a)(5). Accordingly, the Company's refusal to execute the agreement on January 20, 1976, converted the economic strike into an unfair labor practice strike. As there is no showing that the employees had been replaced prior to January 20, the striking employees were entitled to immediate reinstatement on March 29, the date upon which the unconditional offer to return to work was made. Thus, the Company's past and continuing failure to offer reinstatement to the employees violated Section 8(a)(3) of the Act.

Before the Board the Company argued that it properly refused reinstatement because the Iron Workers' offer was not "unconditional or bona fide." In support, the Company asserted that Iron Workers President Colavito, who signed the letter requesting reinstatement of the striking employees, did not know the names or number of the employees involved. Further, the Company argued that one employee was terminally ill and that the whereabouts of a second employee were unknown. Contrary to these assertions, the Iron Workers' letter of March 29 on its face clearly constituted an unconditional request by the Iron Workers on behalf of the Company's production and maintenance employees to return to work (A. 268). Moreover, on January 20 when Matienzo asked the Company to sign the contract and reinstate the employees, Batthaney did not base his refusal on the ground that the employees were not available, but rather he stated that he was having nothing more to do with the Iron Workers (A. 253; 97-98).

The issues raised by the Company with regard to the availability of the employees bear only on the amount of the Company's back pay liability. It is well established that such issues are properly deferred until the question of underlying discrimination has been settled. See N.L.R.B. v. CCC Associates, Inc., 306 F.2d 534, 539 (C.A. 2, 1962); N.L.R.B. v. Duncan Foundry and Machine Works, 435 F.2d 612, 616 (C.A. 7, 1970).^{13/} At that time, the Company will have an adequate opportunity to present factors, such as an employee's unavailability, which may mitigate its liability, and the Board can fashion its ultimate reinstatement and back pay order to reflect any mitigating circumstances. See N.L.R.B. v. Ozark Dam Constructors, 203 F.2d 139, 147 (C.A. 8, 1953); Trinity Valley Iron and Steel Company v. N.L.R.B., 410 F.2d 1161, 1171-1172 (C.A. 5, 1969).

As the Company has shown no valid reason for refusing to reinstate its employees following an unconditional offer to return to work, and, in fact, has demonstrated hostility toward the Iron Workers, the Board properly found that the Company violated Section 8(a)(3) of the Act.

^{13/} As this Court has observed "It is obviously convenient to wait until the question of unlawful discrimination has been definitely settled either by an order of the court or otherwise before the Board takes up the amount of back pay, for its decision will turn out to be moot so far as its order is reversed The same reasons apply with equal force to reinstatement." N.L.R.B. v. CCC Associates, Inc., supra, 306 F.2d at 539 quoting N.L.R.B. v. N.Y. Merchandise, 134 F.2d 949, 951 (C.A. 2, 1943).

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should be entered enforcing the Board's order in full.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ACME WIRE WORKS, INC.,

Respondent.

No. 77-4149

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the appendix and three (3) copies of the Board's brief in the above captioned case, have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 1st day of November, 1977.